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Nos. 5 AND 42

Supreme Court of the United States

OCTOBER TERM, 1961

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONS, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

MEMORANDUM OF RESPONDENTS, THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA WITH RESPECT TO PETITIONER'S MEMORANDUM CONCERNING MOOTNESS AND DEFERRAL OF CONSIDERATION

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Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

RESPONDENT BANKS MEMORANDUM WITH RESPECT TO PETITIONER'S MEMORANDUM CONCERNING MOOTNESS AND DEFERRAL OF CONSIDERATION

POINT ONE

The Respondent banks submit that these cases are now moot and that this court should so hold.

The subpoenas duces tecum issued in Miami, ordered quashed by the United States Court of Appeals for the Fifth Circuit, and the subpoenas duces tecum issued in New York, ordered quashed by the United States Court of Appeals for the Second Circuit, all required the production of records of bank accounts of

approximately twenty-one named persons and corporations covering a period of about ten years. These records are voluminous and include copies of checks, drafts, bills of exchange, deposit and withdrawal slips, statements of account and all related correspondence.

From the sweeping demands of these subpoenas and from the affidavit of Mr. Sidney S. Sachs, one of the counsel for Venezuela, it is abundantly clear that Venezuela is attempting to institute a basic innovation which would permit it to conduct the equivalent of a grand jury inquisition in the United States in order to discover, here, new evidence against the defendant, Jimenez, and others not defendants in the extradition proceeding. Thus in paragraph 7 of his affidavit, sworn to November 25, 1959, Mr. Sachs states:

> "The subpoenas requested are expected to produce evidence of the illegal conduct charged to defendant. It is expected that it will also disclose the method of the illegal concert of action between the *defendant and others,* as well as the extent and nature of a means for concealment of his illegal conduct adopted by the defendant." (Emphasis added)

Venezuela has failed to show any need whatsoever for this extensive inquisition. Indeed, it rested its case long ago in the extradition proceeding, thus indicating that the evidence presented was regarded as sufficient. This appears from the transcript of the hearing in Miami, Florida, before Judge Mathes on May 10, 1960 (p. 56):

> "The Court: Has the plaintiff rested yet?
> "Mr. Sachs [Counsel for Venezuela]: Yes, we have rested. We now rest. . . ."

Further, on the appeal before it the Court of Appeals for the Second Circuit carefully examined the record to see if any showing of need for the sweeping evidence demanded, had been made. And on the basis of that examination the Court ruled that there had been no showing of need, stating:

> "... If, as Venezuela has indicated, it is willing to rest its case upon the record already made, the additional evidence sought would appear to be merely cumulative. Nor has any showing been made as to how $4,400,000 will exceed in legal effectiveness, insofar as meeting the statutory requirement of over $200 is concerned, the $500,000 already claimed by Venezuela. Since at this stage there is *no present showing of need,* it would be unwise in the absence of more specific statutory command or direction to sanction such broad deposition proceedings as are now sought." (Emphasis added)

Similarly, in the Fifth Circuit proceeding Venezuela had made no showing of need, although its demands were equally sweeping.

In accordance with 18 U. S. C. § 3184, Judge George W. Whitehurst who had succeeded Judge Mathes in the conduct of the extradition proceeding, formally certified to the Secretary of State his finding that the evidence was sufficient to warrant extradition. In his certification to the Secretary of State, Judge Whitehurst stated, among other things:

> "11. Paragraphs 15.B and 15.C (supplemented by Paragraph 15.D) of the aforesaid Second Amended Complaint set forth charges that the defendant is guilty of certain financial crimes, each such crime being separately and independently

alleged. . . . Each one of the crimes alleged constitutes embezzlement or criminal malversation by a public officer, as provided for in paragraph 14 of Article II of the aforesaid Treaty, or constitutes fraud or breach of trust by an agent or by one in a fiduciary position, as provided for in paragraph 20 of Article II of the aforesaid Treaty. Likewise such of these crimes as are specified in Paragraph 15.D(3) of the aforesaid Second Amended Complaint constitute in each case the receipt of money or valuable securities knowing the same to have been unlawfully obtained, as provided for in paragraph 18 of Article II of the aforesaid Treaty. In the case of each alleged crime the amount embezzled, misappropriated or received is more than the minimum amount specified in each of these paragraphs of Article II of such Treaty.

"12. *The evidence submitted herein sustains each of the charges of financial crimes so alleged, according to the probable cause standard contemplated by 18 U. S. C. § 3184 and Article I of the aforesaid Treaty.* The defendant, in the several public offices he held during the period referred to in Paragraphs 15.B, 15.C and 15.D of the aforesaid Second Amended Complaint, was charged with responsibility for the administration of public funds, property and contracting authority in the Government of the Republic of Venezuela; *and the evidence shows probable cause to believe that, in his administration thereof, he secured private financial benefit as alleged in such Complaint as to each such crime.*" (Emphasis added)

Venezuela now urges that the cases before this Court are not yet moot because of the possibility that the pending habeas corpus proceeding may result in a remand to the extradition magistrate for the introduction of additional evidence. It is difficult to conceive of such possibility.

The limited scope of review by writ of habeas corpus in an extradition proceeding was forthrightly stated by this Court as long ago as 1896 in *Ornelas* v. *Ruiz,* 161 U. S. 502, at p. 508:

> "By repeated decisions of this court it is settled that a writ of *habeas corpus* cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offence charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus.*"

It is patent from the voluminous evidence introduced by Venezuela, the certification of Judge Whitehurst and the decision of the Court of Appeals for the Second Circuit that there is scant possibility that the habeas corpus proceeding could result in a remand for the purpose of permitting Venezuela to introduce additional evidence. Clearly, Judge Whitehurst had before him competent legal evidence on which to base his judgment and finding of probable cause.

Moreover, Venezuela has been unable to cite a single international extradition case comparable to the instant cases in which a habeas corpus proceeding resulted in a remand for the purpose of permitting a demanding government to introduce additional evidence. And respondents have been unable to find one.

Application of D'Amico, 185 F. Supp. 925 (S. D. N. Y. 1960), appeal dismissed sub. nom. *United States ex rel D'Amico* v. *Bishopp,* 286 F. 2d 320 (2d Cir. 1961)

the only case cited by Venezuela for this proposition was crucially different from the present cases. For there the Commissioner sitting as an extradition magistrate had neglected to make an independent finding of probable cause and accordingly the District Court felt compelled to remand for the taking of additional testimony by the accused and by the demanding government. How different from Judge Whitehurst's careful and detailed certification!

POINT TWO

If this court should, on the present record, refuse to find these cases moot, then these respondents agree that the court should retain the cases on its docket but postpone briefing and argument pending the outcome of the habeas corpus proceeding by Marcos Perez Jimenez.

Dated: New York, N. Y.
August 24, 1961

Respectfully submitted,

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